



**INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202-2884**

December 30, 1994

INSPECTOR GENERAL REGULATION 1400.4

DISCIPLINARY AND ADVERSE ACTIONS

FOREWORD

This Regulation sets forth the overall disciplinary and adverse actions policies, procedures and responsibilities for the Office of the Inspector General, Department of Defense (OIG, DoD). As such, it serves as the guide to implement and manage an effective and efficient disciplinary program.

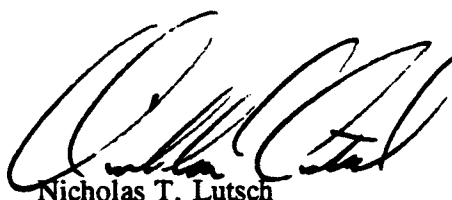
In keeping with the goals and objectives of the Vice President's National Performance Review, September 1993, the Regulation has been streamlined **to** incorporate only the essential elements necessary to manage the program. Exceptions to the policies and procedures contained in this Regulation are not authorized without prior approval of the Assistant Inspector General for Administration and Information Management.

Requests for clarification to policy in this Regulation should be forwarded **to** the Personnel and Security Directorate, OAIG-A&IM, OIG, DoD, 400 Army Navy Drive, Arlington, VA 22202. The issuance of supplements **to** the Regulation is prohibited unless approved and published by the Director, Personnel and Security Directorate.

This Regulation is effective immediately.

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FOR THE INSPECTOR GENERAL:

A handwritten signature in black ink, appearing to read 'Nicholas T. Lutsch', is positioned above the printed name.

**Nicholas T. Lutsch
Assistant Inspector General for
Administration and Information Management**

DISTRIBUTION C

INSPECTOR GENERAL REGULATION 1400.4

SUBJECT: Disciplinary and Adverse Actions

References: Title 5, Code of Federal Regulations (Part 752)

A. Purpose. This Regulation implements the provisions of reference (a) and provides guidance to managers contemplating action to deal with misconduct or inefficiency on the part of an employee.

B. Applicability and Scope. The provisions of this Regulation apply to all Office of the Inspector General, Department of Defense (OIG, DoD) components, unless specifically excluded by statute.

C. Policy

1. When an employee's conduct or capabilities do not promote the efficiency of the Federal service, corrective action must be initiated promptly in accordance with the policy and procedures outlined in this Regulation.

2. In deciding whether to take an action under this Regulation, there may be no discrimination against an employee for political beliefs, marital status, handicapping condition, sex, race, religion, color, national origin, age, or other non-merit factors.

3. Normally, a progression of disciplinary measures is applied in an effort to correct as employee's misconduct. When formal disciplinary action is taken, it should be the minimum likely to correct the misconduct with the penalty increasing if the misconduct continues.

D. Responsibilities

1. **Assistant Inspectors General** are responsible for:

- (a) Ensuring that actions are only taken to promote the efficiency of the service.
- (b) Ensuring that each case is processed promptly and fairly and that discipline is uniformly applied.

2. The **Directorate for Personnel and Security** is responsible for:

- (a) Effectively managing the program.
- (b) Providing technical advice and assistance to all levels of management.
- (c) Drafting disciplinary actions for supervisory signature.
- (d) Providing technical advice to employees regarding their rights.
- (e) Maintaining records of disciplinary actions and preparing required reports.

3. **Supervisors** are responsible for:

- (a) Monitoring employee conduct and initiating appropriate action in a timely, fair and impartial manner.

(b) Setting a good example by their own conduct and communicating to employees standards of conduct and expectations regarding conduct and performance.

(c) Referring employees to the Employee Assistance Program as appropriate under IG Instruction 1426.1.

(d) Consulting with the Employee Relations Division prior to initiating action in accordance with this Regulation.

4. **Employees** are responsible for:

(a) Conducting themselves, on and off duty, in a manner that will ensure their conduct does not reflect adversely on the OIG.

(b) Complying with the Standards of Conduct as prescribed in DoD Directive 5500.7, "Standards of Conduct," August 30, 1993.

(c) Following on-the-job work rules and directives from higher management.

E. Types of Actions

1. **Informal Actions.** Informal actions include such things as oral counseling/admonishment, a letter of caution (warning) (deficiency) and letter of requirement. The Employee Relations Division should be contacted for advice and assistance before initiating any informal action.

a. Oral counseling/admonishment is a face-to-face meeting between the supervisor and the employee where the supervisor discusses inappropriate behavior and puts the employee on notice that formal disciplinary action will be initiated if the misconduct is repeated. It is generally used in situations of a minor nature or when the employee was not given clear notice of rules, requirements, etc. The supervisor should make an informal record of the date of the discussion and the subjects covered.

b. Letter of caution (warning) (deficiency) is a written equivalent of the oral counseling/admonishment and is used in cases where the supervisor should establish a written record of unacceptable behavior. The letter should cite what is believed to be unacceptable, the expected improvement and what may be the consequences of continuing the cited behavior, i.e., disciplinary action up to and including removal from the Federal service. Since the letter is informal, it will not be included in the employee's official personnel file. It may be used to support formal disciplinary action by showing that the employee had been placed on notice of expected behavior.

c. Letter of requirement is a written notice that not only cites the unacceptable behavior and the consequences of continuing such behavior but places certain restrictions on the employee. Most often letters of that type involve leave restrictions, i.e., a requirement to provide proof of incapacitation or a bonafide emergency in the case of an employee who uses excessive amounts of unscheduled leave. A letter of requirement is not filed in the employee's official personnel file but may be used to support/enhance formal disciplinary action by showing that the employee had been placed on clear notice of expected behavior and that the employee failed to follow specific written instructions.

2. **Formal Actions.** Formal actions consist of letters of reprimand, suspensions, demotions and removals. Those actions may not be taken without coordinating the action with the Employee Relations Division. Formal disciplinary action is usually initiated by the immediate supervisor of the employee being disciplined. With the exception of letters of reprimand, all formal disciplinary actions are two-step actions, with a proposing official (normally the first level supervisor) and a deciding official (normally the next level supervisor). The deciding official may uphold, mitigate or fail to uphold a proposed action. A deciding official may not enhance a penalty.

a. Letter of Reprimand. Disciplinary action for misconduct given to an employee in a letter for a violation of a rule of conduct, regulation, official instruction, or particular responsibility. A copy of the letter will remain in the employee's official personnel file for a specified period of time, not to exceed 2 years or until the employee leaves the OIG, whichever comes first.

b. Suspension. A temporary, enforced absence from duty in a nonpay status for a specified number of days that may be imposed as a penalty for significant misconduct. An indefinite suspension, which is relatively rare, places an employee in a nonpay and nonduty status pending an investigation, inquiry, or further action. The indefinite suspension continues for an indeterminate period of time and ends with the occurrence of the pending conditions set forth in the notice of action. There must be a legitimate reason for keeping the employee away from the worksite for an indeterminate period of time.

c. Reduction in Grade or Pay. A reduction in grade or pay for misconduct or inefficiency is normally imposed in lieu of removal. Such action is appropriate only where it can be determined that the employee has skills and abilities to perform the duties of a lower graded position in a satisfactory manner and the organization can use those skills at a lower grade.

d. Removal. An action that removes the employee from his/her position and from the Federal service. Since that is the most severe type of action, the facts and circumstances in the case must support the conclusion that the employee has clearly demonstrated unsuitability for continued employment or as unwillingness or refusal to conform to the rules of conduct expected of a Federal employee.

F. Basis of the Action. Disciplinary/adverse actions can only be taken for such cause as will promote the efficiency of the service. To meet that standard, an action must meet four basic criteria. First, the charges or reasons on which the action is based must be clearly stated. Second, there must be proof of the specific reasons or charges that form the basis for the action by a preponderance of the evidence. Third, there must be a connection or "nexus" between the charges and promotion of the efficiency of the service. Finally, the penalty chosen must be appropriate under the circumstances.

G. Non-disciplinary Adverse Actions. Certain kinds of adverse actions are considered non-disciplinary in nature. For example, separation for physical or mental inability to perform the duties of the position, failure to maintain a condition required for employment (such as loss of a security clearance) or lack of work or funds necessitating a furlough.

H. Selection of Penalty. In selecting a penalty, all of the specific circumstances of the case should be taken into account. The penalty must be proportional to the offense and imposed with consistency and equity. In cases where an employee has engaged in acts of misconduct directly related to the OIG mission, the supervisor should consider proposing removal for the first offense unless substantially mitigating circumstances exist. Past offenses may form the basis for proposing a higher penalty for subsequent offenses. The offenses need not be identical or similar in nature. After review of all the evidence, the employee relations specialist will advise the proposing official of the appropriate penalty, as well as any appropriate alternative corrective action. In the case of Douglas v. Veterans Administration, 5 MSPB 313 (1981), the Merit Systems Protection Board enumerated 12 factors which it considered relevant when determining the reasonableness of a disciplinary action. Those factors, commonly referred to as the "Douglas Factors," are widely accepted, and their use assures not only that actions taken are fair and equitable, but additionally that the action can withstand the scrutiny of a third party, such as an administrative law judge. All of the relevant factors listed below shall be considered before taking formal disciplinary action.

1. The nature and seriousness of the offense and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.

2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.
3. The employee's past disciplinary record.
4. The employee's past work record.
5. The effect of the offense on the employee's ability to perform at a satisfactory level.
6. Consistency of the penalty with those imposed on other employees for the same or similar offense in like or similar circumstances.
7. Consistency of the penalty with agency table of penalties (if one exists).
8. The notoriety of the offense and its impact on the reputation of the agency.
9. The clarity with which the employee was on notice of any rules that were violated is committing the offense.
10. Potential for the employee's rehabilitation.
11. Mitigating circumstances surrounding the offense.
12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

I. Procedures. Federal law and regulations require that mandatory procedural steps be followed when taking disciplinary or adverse action against an employee. Failure to adhere to those procedural requirements may lead to reversal of an action on its appeal without consideration of the merits of the case. Before initiating a disciplinary or adverse action, the supervisor must investigate the incident, obtain witness statements and any other documentation relating to the misconduct. That should include as explanation, written or oral, from the employee. If the supervisor personally witnesses the misconduct, he/she should prepare a memorandum for the record summarizing the incident. All pertinent information gathered during the course of the investigation will be forwarded to the Employee Relations Division for review and preparation of the appropriate action.

J. Requirements for Informal/Formal Action

1. A **letter of caution** will:
 - a. Specify the reasons) for its issuance.
 - b. State that future misconduct may lead to formal disciplinary action.
 - c. State that it is neither grievable nor appealable.
 - d. State that it will not be make a matter of record in the employee's official personnel file.
 - e. State the length of time the supervisor will maintain a copy.
2. A **letter of requirement** will:
 - a. Specify the reason(s) for its issuance.

- b. Specify the specific requirement(s) the employee must meet.
- c. State the length of time it will remain in effect.
- d. State that failure to meet a requirement may lead to disciplinary action.
- e. State that it will not be counted as a prior offense when determining a penalty, but may be applied as an aggravating factor in determining a penalty should an offense subsequently occur.
- f. Specify the employee's right to file a grievance.

3. A **letter of reprimand** will:

- a. Describe the offense in sufficient detail to facilitate a reasonable understanding of the basis for issuance.
- b. If applicable, include reference to any past counseling or other attempts to correct the employee's behavior.
- c. Provide a warning that any recurrence of misconduct will result in a more severe disciplinary action.
- d. Include a statement that a copy of the letter of reprimand will be placed in the employee's official personnel file for a period not to exceed 2 years or when he/she leaves the OIG, whichever occurs first.
- e. Specify the employee's right to file a grievance.

4. **Suspensions of 14 days or less** require:

- a. A written notice of proposed action, stating:
 - (1) The specific reason(s) for the proposed action.
 - (2) The name and title of the deciding official who has been designated to hear an oral reply and/or receive the written reply. The official must be in a higher position than the official who proposed the action, unless the Inspector General issued the advance notice, in which case the Inspector General may also issue the decision.
 - (3) The right to review and/or have a representative review the material relied on to support the reason(s) given in the notice of proposed suspension.
 - (4) A reasonable amount of official time, normally not more than 4 hours, to review the material, secure affidavits and prepare an answer, if the employee is otherwise in an active duty status. Arrangements for the use of official time must be made in advance with the immediate supervisor.
 - (5) Ten calendar days to answer orally and/or in writing and to furnish affidavits and other documentary evidence in support of the answer, including medical documentation to support any medical or handicapping condition alleged to have caused or contributed to the reason(s) for the proposed action.
 - (6) The right to be represented by an attorney or other reprove. An employee's choice of representative may be disallowed if such representation results in a conflict of interest or position.

(7) The right to request an extension of the time limit allowed for a reply to be considered by the official designated to accept the response.

(8) A statement that a written decision will be issued at the earliest practical date after the employee's reply, if any, or after the time allotted to reply has expired.

b. A written notice of decision, which:

(1) Considers only the reasons specified in the notice of proposed action.

(2) Considers any oral/written replies by the employee and/or the employee's representative made to the designated official.

(3) Specifies the reason(s) for the decision.

(4) Is signed by the designated deciding official.

(5) Is delivered to the employee before the effective date of the suspension.

(6) Specifies the employee's grievance rights.

5. **Removal, suspension for more than 14 days, demotion or furlough for 30 days or less** require:

a. A written notice of proposed action, which provides:

(1) At least 30 days advance written notice.

(2) The specific reason(s) for the proposed action. If the action is a furlough, the notice must state the reason(s) for the furlough and the basis for selecting the employee if all individuals in the employee's competitive level are not being furloughed.

(3) The name and title of the deciding official designated to hear an oral reply or receive a written reply. The official so designated must be an official in a higher position than the official who proposed the action, unless the Inspector General issued the advance notice, in which case the Inspector General may also issue the decision.

(4) The right to review and/or to have a representative review the material relied on to support the reason(s).

(5) A reasonable amount of official time, normally not more than 4 hours, to review the material, secure affidavits and prepare an answer, if the employee is otherwise in an active duty status. Arrangements for the use of official time must be made in advance with the immediate supervisor.

(6) Ten calendar days to answer orally and/or in writing and to furnish affidavits and other documentary evidence in support of the answer, including medical documentation to support any medical or handicapping condition alleged to have caused or coned to the reasons) for the proposed action.

(7) The right to be represented by an attorney or other repreve. An employee's choice of representative may be disallowed if such representation results in a conflict of interest or position.

(8) The right to request an extension of the time limit allowed for a reply to be considered by the official designated to accept the response.

(9) A statement that a written decision will be issued at the earliest practical date after the employee's reply, if any, or after the time allotted to reply has expired.

b. A written notice of decision, which:

- (1) Considers only the reasons specified in the advance written notice.
- (2) Considers any answer the employee and/or the employee's representative made to the deciding official.
- (3) Specifies the reasons for the decision.
- (4) Is delivered to the employee on or before the effective date.
- (5) Specifies the employee's right to appeal to the Merit Systems Protection Board.

c. These are two exceptions to the requirement for 30 days advance notice:

(1) Emergency furlough, which is defined as a furlough necessitated by "unforeseeable circumstances, such as sudden breakdowns in equipment, acts of nature, or sudden emergencies requiring immediate curtailment of activities." The provision waives both the requirements for advance notice and the right to answer in such cases. The employee is entitled, however, to appeal where appropriate, or to grieve.

(2) Crime provision, which is when the agency has reasonable cause to believe that an employee has committed a crime for which a sentence of imprisonment may be imposed. "Reasonable cause to believe" is not established by the mere fact either of an arrest or an ongoing agency investigation of possible criminal misconduct. A criminal indictment will usually constitute reasonable cause. However, caution must be exercised before proposing an action under the crime provision. Under the provision, an employee is required to furnish an answer, including affidavits and other documentary evidence, within 7 calendar days.

K. Supporting Evidence. Because management bears the burden of proof in disciplinary matters, it is important that disciplinary actions, whether formal or informal, be well documented. Such documentation includes memoranda for the record of counseling sessions and/or incidents giving rise to the discipline, copies of time and attendance records, medical certificates, letters of warning, investigator reports, witness statements, etc. A disciplinary action must be supported by a preponderance of the evidence, which is defined as the "degree of relevant evidence which a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue."

L. Status During Notice Period. Under ordinary circumstances, employees will remain in a duty status in their regular positions during the advance notice period. Other options, e.g., voluntary use of leave, reassignment, detail, etc., may be appropriate in a given situation. If all other options have been explored and found not feasible, the employee may be excused from duty, without charge to leave or loss of pay, during the notice period. Excused absence for this purpose should be used only in those rare circumstances where the retention of the employee in an active duty status during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize Government interests. Care should be exercised to use the minimum amount of excused absence necessary in any individual situation.

M. Special Considerations

1. If a supervisor suspects that an employee has a personal or medical problem that is impacting on the employee's conduct or performance, the employee should be encouraged to use the Employee Assistance Program. While it is not the responsibility of the supervisor to diagnose an employee's problem, it is his/her responsibility to recognize that a problem exists and to assist the employee in overcoming a problem that adversely impacts on the employee's conduct or performance.

2. Should an employee respond to counseling or discipline by asserting a medical condition, the supervisor should request medical documentation to support the assertion. The Employee Relations Division will prepare the request for medical information. Once received, the medical information will be reviewed by a Department of Defense physician who will interpret the medical information and its significance. After the medical information has been closely reviewed, the supervisor, with assistance from the Employee Relations Division, must decide how to proceed.

N. Records. The Employee Relations Division will maintain the official agency files on all disciplinary and adverse actions. Those files will be kept apart from the official personnel file. If the employee appeals an action to the Merit Systems Protection Board, the record shall be furnished to the employee and the Merit Systems Protection Board.